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THE CONSTITUTIONAL RECOGNITION AND POPULAR ENJOYMENT OF HUMAN RIGHTS IN ZIMBABWE

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INTRODUCTION

In a key-note address to Law students of the University of Zimbabwe on May 9, 1980 the then Minister of Justice and Constitutional Affairs, Simbi V. Mubako, called upon the academic lawyer to be an activist and a crusader for social justice and concluded that:

"The academic lawyer, the practising lawyer and society as a whole must continue . . . the fight for social justice, so that there is not one law for the rich and another for the poor."

This was a call on the academic lawyer to be partisan and be on the side of the mass of the people in their fight for equality and social justice. In the words of Africa's revolutionary martyr Samora Machel:

"As men, as a country, as a State, we must always choose which side we are on: on the side of a privileges handful, with the people against us, or on the side of the people, with a dethroned privileged handful against us."¹

In this paper I not only answer Simbi Mubako's call to be an activist and a crusader for social justice, but I also clearly choose which side I am on. Consequently, this article makes no pretence or claim to a mythical professorial and academic neutrality in discussing and analysing the recognition and enforcement of human rights in Africa, in general and Zimbabwe, in particular. The approach adopted here is clearly partisan and articulates the demands of the mass of the peasants and working people of Zimbabwe for human rights and dignity. Partisanship in this particular case is not to be mistaken for subjectiveness and bias in the non-scientific sense. Partisanship is used in the objective sense of evaluating, upholding and fighting for those objective material and social conditions for the achievement of social justice.

Having defined my approach as clearly partisan, I will approach the discussion of human rights in the following manner:

Firstly, I will seek to demonstrate the importance of discussing human rights within the specificity of their historical development with a view to underlining

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¹ S.M. Machel, *Our Sophisticated Weapon*, Maputo, Dept. of Information and Propaganda, 1982, p.11

the fact that human rights are not natural and inherent in man but invariably arise out of demands and victories of peoples in social and political struggles. The content and practical enjoyment of human rights under capitalism and under socialism will be used to illustrate the historically determined class nature of human rights.

Secondly, I will show how human rights became a focus of international concern particularly in the post-second world war period, thus making it unsafe for any regime to openly reject the principle of protecting human rights.

Thirdly, I will give an overview of the economic and political conditions that negate the recognition, enforcement and enjoyment of human rights in African countries dominated by imperialism. It will be argued that the economic dependence and exploitation of practically all African countries inevitably gives rise to undemocratic institutions which are incompatible with the recognition of and/or respect for most of the often canonized bourgeois political and civil rights.

Fourthly, I will discuss the recognition and enforcement of human rights in Zimbabwe as embodied in the Lancaster House Constitution of 1979 with particular reference to the protection of the right to personal liberty as affected by and derogated from during a State of Emergency as has existed in the country since 1965.

Fifthly, and lastly, I will argue the case for the continuation of a justiciable Bill of Rights after the expiry of the entrenched clauses of the Lancaster House Constitution in 1990.

THE CONCEPT OF HUMAN RIGHTS IN HISTORICAL PERSPECTIVE

Any scientific and analytical approach that seeks to understand any social or legal phenomenon must inevitably trace that phenomenon to its emergence in history with a view to explaining the social, political and economic conditions that gave rise to the phenomenon. The concept of human rights as understood and recognised today has not always existed. Primitive societies, slave owning societies and feudal societies did not recognise any human rights provisions. Equality of all persons as a social and legal doctrine was unknown to these early societies in which the recognition and enforcement of the present day civil and political rights would have totally negated the social organisation of those societies. For example, Roman Law jurists of the Roman Slave Empire, would have dismissed as absurd the claim or idea that slaves and, indeed, peregrines, were inherently entitled to equal political status and protection of the law. Consistently, Roman law could not recognise and enforce the "natural right" of slaves to be protected from slavery, forced labour, inhuman treatment and torture when a slave owner had a legally protected right to flog, torture and kill his slave at any time and for whatever, eccentric or otherwise, reason that may have suited his fancy and whims. The slave had no right to life. Similarly a feudal serf could have no "natural right" to equality before the law and to equal political status. He could have no legal or social claim against forced labour, against invasion of his

"home" and privacy; he could have no freedom of association, expression or movement in circumstances where the social and legal regime sanctioned his inequality and bondage to serfdom.

The concept of protected human rights first emerges in history during the struggles and revolutions of the bourgeoisie against feudal fetters and absolutism. The call and clamour for recognition, respect and enforcement of human rights was adopted by the bourgeoisie as a battle cry against feudalism and its inequities. The bourgeoisie rallied behind it, all the other oppressed elements of society in its assault on feudalism in claiming equality of all persons before the law. It must, however, be noted that the idea or notion of "equality" of all human beings pre-dates the bourgeois revolutions and is as old as man's civilization. Thus the idea of equality—that all human beings have something in common and to that extent are also equal—is an ancient idea. However, the modern concrete demand for social equality and equality before the law is something relatively new and qualitatively different from the primitive notions of equality of all human beings by virtue of their being human.² As already observed, this demand for equality and protection of human rights was given meaning and content by the bourgeoisie in its struggles against feudalism which negated and hindered the development and full realisation of the process of industrialisation and capital accumulation by chaining serfs to the land of the aristocracy and landlords and thereby denying the bourgeoisie a "free reserve pool of labour" to be used in their emerging factories and other enterprises. The process of industrialization introduced and led by the bourgeoisie required the availability of "free" human beings who could be hired by the bourgeoisie in their factories and other enterprises. The existence of such a pool of "free" human beings was negated by feudalism and its system of serfdom. In these circumstances the bourgeoisie demanded the liberation of all persons from all feudal fetters and the establishment of equality of rights by the abolition of feudal inequalities. This revolutionary bourgeois demand which was fully supported by serfs became a battle cry against the absolutism of feudalism. Engels says of this battle cry:

"... it was raised in the interests of industry and trade, it was also necessary to demand the same equality of rights for the great mass of the peasantry who, in every degree of bondage, from total serfdom onwards, were compelled to give the greater part of their labour time to their liege lord without compensation and in addition to render innumerable other dues to him and the state."³

Therefore, what should be underlined is that the concept of human rights as a concrete historical phenomenon was first articulated and introduced by the bourgeois class in its fight against feudalism. It is therefore, clearly false to present human rights as "eternal inalienable, unalterable fundamental values inherent in man", which can be claimed "by everybody at any time and in any

² See F. Engels, *Anti-During*, Progress Publishers, Moscow, 1978.

³ Ibid pp. 130-131.

case", as some bourgeois scholars often do.⁴ Human rights are clearly an outcome of demands made and won by people in political and social struggles. These demands arise from the concrete material conditions that would be in existence in any particular society. If the concept of human rights is viewed from this context it is clear there can be no eternal and invariable human rights and that the concept of human rights has not always existed as a socially recognized enforceable concept.

Engels⁵ has clearly demonstrated that human rights have a historical and class character and cannot be presented as eternal truths that were discovered by some ingenious minds.

While it was the bourgeoisie that championed the cause for the recognition of human rights, it must be realized that when the bourgeoisie demanded equality and freedom they were in alliance with the mass of the people because the class demands of the bourgeoisie, which were directed against the feudal nobility, also *objectively* expressed interests of the mass of the serfs who were suffering from the oppression and exploitation of the feudal nobility. It was objectively in the interests of the mass of the people to abolish aristocratic privileges, the limitations imposed by the system of guilds, the feudal ties to the soil, the flagrant injustice of the despotism of feudal landlords and the totalitarianism of the feudal monarchs.⁶

Thus the driving force behind the recognition and enforcement of human rights provisions has been invariably the struggle of peoples demanding respect for their rights and dignity as human beings. This fact, however, should not be allowed to obscure the class content of human rights in the sense that their content is inextricably linked to their historical character as having been won by a definite class in social struggles. The bourgeoisie having vanquished feudalism proclaimed all sorts of rights. The most notable of such rights were declared in the French and American Declarations on the Rights of Man.⁷ But these rights, as proclaimed by the successful bourgeoisie, did not apply to all human beings. For example, the American Declaration of Independence of 1776, asserted that:

"We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights that among these are life, liberty and the pursuit of Happiness . . ."

⁴ See, for example, M. Cranston, *What are Human Rights*, Butterworths, London, 1973, p.21.

⁵ Ibid. pp. 128-136

⁶ See W. Weichelt "Some Remarks on the Concept of Human Rights" in *Law and Legislation in the G.D.R.* Vol. 2, 1978 pp. 37-39

⁷ For the full texts of these Declarations, see I. Brownlie, *Basic Documents on Human Rights*, Oxford University Press, London 1971, pp. 8-10 and pp. 11-13 respectively.

This ringing declaration of equality of all "men" by the makers and founding fathers of the American Constitution did not and could not apply to all human beings. Most of the founders and makers of the American Constitution were themselves slave-owners who had enriched and continued to enrich themselves through the commerce of trading in black human beings, selling and exchanging them in the slave market as if they were animals. Surely, the slaves could not have been "created equal" when they were legally subjected to slavery! It took Americans a hundred years after their Declaration of Independence and a bloody civil war to abolish the abominable and inhuman system of slavery. The fact that the founders of the American constitution were able to portray themselves as ardent democrats and respecters of human rights in their Constitutional declarations and yet American society continued to practice and perpetuate slavery, clearly shows the bourgeois and racial character of the human rights they proclaimed.

Thus, while pronouncing the natural equality of all human beings, the American Constitution, in the same breath, confirmed the slavery of the black Americans who were, for census purposes, counted as constituting three-fifths of a white human being.

Could there be a greater affront to human dignity and human equality? Could there be a clearer illustration of the class character of human rights, even though they are invariably expressed in such abstract formulations as if they apply to everyone irrespective of his race or social position? Further, the founding fathers of the American Constitution did not conceive of women as equal beings. Their use of the term "men" was not accidental but reflected their conception of women whom they denied the right to vote and participate in the political affairs of the country, as unequal to men. Indeed, as late as 1873 the American Supreme Court was to deny Myra Bradwell the right to be admitted to the Illinois Bar on the basis that she was a woman and under male protection. The Supreme Court declared:

"Man is, or should be, a woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."⁸

It was not until 1975 that the United States Supreme Court reversed this judicial perception of women when it criticized the Bradwell case "reasoning" as reflective of "romantic paternalism" that put "women not on a pedestal but in a cage"⁹

The human rights declared and endorsed by the bourgeoisie were clearly rights of a privileged few. Not everyone was entitled to these rights, the civil and

⁸ See *Bradwell v Illinois*, 83 U.S. (16 Wall) 130 (1873) at pp. 141-142. For similar reasoning in discriminating against women see *Muller v Oregon* 208 U.S. 412 (1908)

⁹ See *Frontiero v Richardson* 411 U.S. 7 (1975).

political rights of the bourgeoisie. They were rights of a certain class of men, the propertied men.

Their persons, their privacy, their freedom, their liberty and above all their property were deemed worthy of protection by the law and the state. It is they who enjoyed the freedom to participate in the political affairs of the country. The British Parliament, for example, has existed for 500¹⁰ years and yet not until 1918 were the elections of its members based on a universal franchise embodying the democratic principle of one person one vote.¹¹ Membership of Parliament and the right to vote was a privilege of the rich up until 1885 when working men won the franchise.¹² The industrial middle-class and lower-middle classes had been added to the franchise in 1832 and 1867 respectively.¹³ Women only won the right to vote in 1918 when universal suffrage was introduced by the Representation of the People Act, 1918.

The French Declaration of the Rights of man, prefixed to the Constitution of 1791 declared that: "Men are born and live free and equal in their rights. . ." and yet the right to participate in the political processes belonged only to the propertied classes of men.

What clearly emerges from this historical perspective is that human rights have a definite class character which is linked to their concrete historical development. That the rights declared by the bourgeoisie were only to be enjoyed by them is borne by the misery and deaths of the era of the industrial revolution during which the working people toiled and died in bourgeois factories where they worked and were brutalised under inhuman conditions.

The characterization of human rights as possessing a definite class content inevitably leads us to the conclusion succinctly summarized by W. Weichelt thus:

"No ruling bourgeoisie—whatever humanistic it may pretend to be in its declarations is in a position to allow the working class to implement the human rights proclaimed and constantly canonized by the bourgeoisie if these classes interpret this very freedom also as freedom from capitalist exploitation and oppression, if *equality includes the transformation of capitalists into workers* and fraternity is understood as abolition of capitalist competition, which is based on the fierce struggle for existence of everyone against everyone . . . The human

¹⁰ See W. Bagehot, *The English Constitution*, pp. 252–265 and H. Street and R. Brazier, *Constitutionary and Administrative Law de Smith*, (4th ed), Penguin Books, Middlesex 1981, p.235.

¹¹ See the Representation of the People Act, 1918.

¹² See the Reform Act, 1885

¹³ See the Reform Act, 1932 and the Reform Act, 1867 respectively. See also W. Bagehot, *supra* pp. 267–283.

rights of the bourgeoisie are not those of the working classes, that between them there exists the same contradiction as in the antagonism between the working class and the bourgeoisie in general. The capitalists' right to own capital is the injustice of exploitation for the worker. *The expropriation of his enterprise, which the capitalist considers as injustice, however, is the worker's right to be free from exploitation and oppression*"¹⁴

This fundamental difference in the bourgeoisie and working class conceptions of human rights and equality is inextricably linked to the class struggles from which the concept of human rights emerged. Consequently, the history of mankind after the bourgeois revolutions has been a history of social battles to end inequality, discrimination and to extend the basic rights proclaimed by the bourgeoisie to all members of society. The central actors in these struggles have been peasants, workers, religious groups, women, emergent nations and ethnic minorities.

It is hoped that this historical sketch of the emergence of the notion of human rights and its legal recognition and enforcement after the fall of feudalism has demonstrated the importance of discussing human rights within the context of their historical development. The historical perspective, it is hoped, has demonstrated the class character of human rights and that they are *not* eternal, inalienable, unalterable fundamental rights inherent in man, which can be claimed by everyone at anytime and at any place, regardless of his social position.¹⁵

HUMAN RIGHTS UNDER CAPITALISM

The objective of the above historical perspective has been to demonstrate that human rights do not represent eternal, universal and inalienable values inherent in man, which values have always been acknowledged, recognized and enforced by law. The notion of human rights as a recognized and enforceable concept emerged with the emergence of the capitalist system which vanquished feudalism.

The bourgeoisie after vanquishing feudalism declared that all human beings were free and equal. They formulated and declared civil and political liberties, the so-called first generation of rights. They declared that all human beings are born equal, that everyone has a right to life; liberty; security of the person, equal

¹⁴ *Op cit* p.35 See also "Fundamental Questions Concerning the Theory and History of Citizens' Rights", by Imre Szabo in *Socialist Conception of Human Rights*, pp. 27-81

¹⁵ See generally V Bolshakov, *This Whole Human Rights Business*, Progress Publishers, Moscow 1980, K Marx and F. Engels, *The Holy Family Or Critique of Critical Criticism*, Progress Publishers, Moscow 1975 and G Maltsey, *An Illusion of Equal Rights*, Progress Publishers, Moscow 1982.

protection of the law freedom of expression, assembly and conscience; freedom from torture, inhuman and degrading treatment and a right to be protected from deprivation of his property.

The bourgeoisie expressed and continues to express these rights in abstract formulations which make it appear as if these rights are for everyone and capable of being claimed and enjoyed by everybody notwithstanding their particular material, economic and social circumstances. However, operating in a class society in which the majority of people have been materially deprived while a minority own and possess all of society's wealth, these rights are meaningless to the majority of the people. In a class society how can people have equal protection of the law when they have no equal access to the courts and have, therefore, no equal capacity to mobilize the law? The poor cannot have justice because they have no capacity to enforce or defend their rights in the courts. The position is aptly summarized by the English saying that the doors of the Ritz Hotel are open to everyone. Yet only the very rich can afford to pass through them.

In practice, therefore, the civil and political liberties enshrined in the constitutions of capitalist countries notwithstanding their abstract formulations are capable of enjoyment only by the propertied classes who have resources to mobilize the system. The working classes have no material capacity to assert and defend the theoretical rights they possess.

Thus under capitalism the declared political and civil rights are only for the bourgeoisie in the sense that only they have the capacity to fully enjoy these rights and hence their characterization as bourgeois rights. Human rights are therefore class rights. For example, the Constitution of the United State of America contains one of the most elaborate Declaration of Rights in the world. Among other things, the Constitution enshrines the rights to equal protection of the law, the rights to liberty; the rights to freedom of assembly, expression and conscience and the right to life.¹⁶ However, in the United States of America more than 20 million people are unemployed, homeless and destitute and live in conditions of abject poverty, some of them often starving to death. Hundreds die of cold in the streets every winter while millions are illiterate.¹⁷ In Britain it is common knowledge that more than 15 million people are jobless, homeless, poor and destitute. Thousands sleep in the open air and many of them die of cold in winter. All these people supposedly have a right to life and yet they are denied by the capitalist system the means of living. What meaning does the elaborate American Bill of Rights have to these millions of people? Without socio-economic rights the enshrined political and civil rights are, for practical purpose, worthless to these people who are continually being dehumanized by the capitalist system. Even though they are homeless, bourgeois law forbids them

¹⁶ See the first ten amendments to the U.S. Constitution as well as the 13th, 14th and 15th Amendments.

¹⁷ See *The Sunday Mail*, 8th April, 1987.

from sleeping under bridges. Indeed, in its majestic neutrality and total disregard of social inequalities bourgeois law forbids both the rich and the poor and homeless from sleeping under bridges. But then the rich have no reason to sleep under bridges. This is the bourgeois understanding of equal protection of the law.

The administration of any capitalist system invariably results in iniquities occasioned by material inequality, racial and class prejudice and sexual discrimination. Notwithstanding the equal protection of the law clauses of the United States Constitution the working classes and proletariat have no access to the protection of the law while black people are discriminated against in a variety of ways. Even the administration of justice is heavily weighted against black people because of the prejudice of a white dominated judiciary.

The point is that the capitalist system being based on social inequalities does not allow all the people to enjoy the abstractly formulated human rights canonized in bourgeois constitutions. Wherever there is social inequality, social deprivation, unemployment, poverty, homelessness and hunger human rights provisions would remain meaningless to the socially deprived, homeless and unemployed. The bourgeois attitude towards the denial of socio-economic rights is aptly expressed in the words of the great bourgeois judge Lord Denning (M.R.) in *Southwark v London Borough Council v Williams* (1971) CH. 734. at 744.

"If homelessness were once admitted as a defence to trespass, no one's house would be safe . . . so the courts must for the sake of law and order take a firm stand. They must refuse to admit a plea of necessity to the hungry and the homeless, and trust that their distress will be relieved by the charitable and the good."

HUMAN RIGHTS UNDER SOCIALISM

Marxism-Leninism starts from the standpoint that the abolition of capitalist exploitation is a pre-condition for the popular enjoyment of human rights. In this no dichotomy is drawn between civil and political rights on the one hand and socio-economic rights on the other. In Marxian terms human rights include civil, political and socio-economic rights on the basis that one is impossible without the other. Thus, socio-economic rights and civil rights are an inseparable unit that can only be realised in their totality under socialism which abolishes exploitation and social inequality. Only socialism can guarantee the enjoyment of both socio-economic and civil rights. Only under socialism can the rights to work, to education, to housing and to free health services be realized and guaranteed. Only socialism can establish material equality of all persons and equal protection of the law. Only under socialism can the social evils of poverty, homelessness, hunger and starvation be abolished forever.

That the abolition of poverty, hunger, illiteracy and unemployment is only possible under socialism has been amply demonstrated by the achievements of socialist countries such as the Soviet Union, the German Democratic Republic, Hungary and many others.

In these countries there is, for all practical purposes, one hundred percent employment and literacy. Exploitation has been abolished and socialist democracy instituted.

The success of socialism in various countries has clearly falsified the argument of bourgeois ideologies who have attempted to argue that only civil and political rights are natural and inherent in man and, therefore, capable of constitutional recognition and enforcement. A number of bourgeois scholars usually insist that socio-economic rights are unnatural and constitute mere moral demands on the state which cannot be constitutionally recognised and enforced like other legal rights.¹⁸ Consequently, they argue that it is meaningless to constitutionally guarantee socio-economic rights. Of course, it is meaningless to declare socio-economic rights in a capitalist country because capitalism is a total negation of socio-economic rights. However, where capitalism has been abolished socio-economic rights can be and are in fact guaranteed and realized.

THE INTERNATIONALISATION OF THE DEMAND FOR HUMAN RIGHTS

We have seen that the notion of human rights as a concrete concept did not come into existence until the American and French Declarations on the Rights of Man.¹⁹ However, the concept of human rights did not receive universal international recognition and serious concerted attention and concern until after the Second World War. Before the Second world War, some first world countries recognised and enforced political and civil rights (the so-called first generation of human rights) within their own jurisdictions. It was not until the 1917 Socialist Revolution in the USSR that economic, social and cultural rights were asserted, recognised, formulated and enforced. Before the 1917 Socialist Revolution in the USSR, no country in the world recognised and implemented socio-economic rights. All of those countries that recognised and protected human rights provisions were concerned with civil and political rights, namely the right to life, liberty, protection of the law, freedom of conscience, expression, religion and assembly protection of private property, protection from torture and inhuman treatment, etc.

After the Second World War and having been shaken by the barbarity of the war and the horrors of Nazism, independent nations moved determinedly to try and prevent a recurrence of that barbarism. Article 1, para 3 of the United Nations Charter defined one of the goals of the United Nations a "to achieve international co-operation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Soon after the establishment of the United Nations, work on the drafting of the Universal Declaration of Human Rights began. The United Nations General Assembly adopted the Universal Declaration of Human Rights

¹⁸ See for example, M. Cranston (*supra*), pp. 30-37

¹⁹ For a contrary view, see N.S. Rembe, *African and Regional Protection of Human Rights*, Roma, Leoni, 1985, p.84

in December 1948. The Declaration which is not legally binding on signatory states starts off thus:

“Whereas recognition of the inherent dignity and of equal and inalienable rights to all members of the human family is the foundation of freedom, justice and peace in the world. . .”

This statement links world peace with the respect for human rights with the clear implication that human rights (whatever their content) are impossible to enjoy without peace.

This conclusion was dictated by the barbarism and cruel experience of the Second World War. It is here that the starting point of the human rights question as a matter of international concern is to be found.

After adopting the Universal Declaration of Rights in 1948 the United Nations General Assembly instructed The Commission of Human Rights “as a matter of priority” to complete the task of producing something that would be legally binding,²⁰ namely “a draft convention on human rights and draft measures of implementations.”²¹

The Commission produced two covenants, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These Covenants were adopted by the United Nations General Assembly in December 1966. However, a significant number of countries, including the United States of America, have not as yet ratified these covenants.²²

In Europe the Western European countries adopted the European Convention on Human Rights in 1950 while the Organisation of American States adopted its own regional Convention on Human Rights in 1969. In Africa, the Organisation of African Unity, adopted its own regional instrument on Human Rights called the African Charter of Human and People's Rights in 1981.

This international trend towards recognition and respect for human rights, be it under the auspices of the United Nations or regional organisations, has increasingly put the human rights question in the forefront of the focus of the international community. Human rights have accordingly become an important area of concern for scholars, social activities and other international agencies or actors. This international concern must be understood within the context of the savage tyranny, oppression and exploitation that has been witnessed by mankind since the end of the Second World War.

²⁰ The Universal Declaration of Human Rights is not binding on States but constitutes a mere expression of intent to promote human rights.

²¹ See M. Cranston *op cit* p. 155

²² Ibid, pp.57-59 and V. Kuaryavtsev “Human Rights Concept” in *Social Science*, Vol. I, 1987, pp. 90-91

Brutal regimes that did not and do not respect freedom and liberties of any kind such as the cruel and inhuman governments of Idi Amin in Uganda, J. Bokassa in the Central African Republic, I. Smith in Rhodesia, Botha in South Africa, Pinochet in Chile and many others have rallied progressive international activists to the defence of humanity. Thus the proliferation of brutal and repressive regimes in the World, being a total negation of human rights, should be a major concern for all progressive mankind.

International interest and activism in the field of human rights has put the human rights question at the forefront of international issues so that human rights have taken hold of the aspirations of people throughout the world to the extent that it is no longer safe for rulers to openly reject the content of human rights. However, that notwithstanding, gross violations of human rights continues to plague most countries of the world. Most people of the Third World, not only suffer from material deprivation, exploitation, poverty and hunger, but live under neo-fascist dictatorial regimes who owe allegiance only to themselves and their imperialist sponsors. The brutality of most such regimes is today well documented due to the tireless and courageous efforts of human rights organisations and activists supported by all sections of the progressive international community. The bizarre and barbaric human rights violations of Master Sergeant Samuel Doe's neo-fascist regime in Liberia are well documented in *LIBERIA; A Promise Betrayed: A report on Human Rights* by the Lawyer's Committee for Human Rights, 1976. This report that chronicles mass summary executions (including dismemberment and cannibalism), political detentions, rapings, flogging and torture, kidnappings and abductions, judicial corruption and other acts of savage brutality committed by an army long gone out of control, make chilling reading and is representative of human rights conditions in most countries of the Third World.

Regrettably, however, most reports on Human Rights have concerned themselves with violations of political and civil liberties to the almost total exclusion of the denial of basic socio-economic rights without which civil and political liberties are impossible to enjoy for the mass of the people. Denials of socio-economic rights are most pronounced in the Third World countries under the grip of imperialism and in the imperialist countries, themselves, particularly Britain and the United States of America where millions of people are homeless and unemployed.

HUMAN RIGHTS CONDITIONS IN AFRICA

Historical Background

The concept or principle of human rights as understood today was unknown in pre-colonial Africa dominated by feudal despotism. Any pretensions to the contrary by European apologetic scholars and African nationalists are palpably false and are without any historical foundation. Falling within this category of scholars is Nasila Selasini Rembe, who, in *Africa and Regional Protection of*

Human Rights attempts to argue that traditional African societies were in fact preoccupied with human rights, be they groups or individual rights. The concepts of equality before the law, protection of private property and freedom were totally negated by the despotism of feudal monarchs who were a law unto themselves. In Zimbabwe, for example, the feudal mode of production allowed the Ndebele State to persistently raid the Shona kingdoms to appropriate their cattle. Within, the Ndebele State itself democracy was conspicuous by its total absence. The king ruled, consulting only his royal advisers. Women were dominated, oppressed and underprivileged. They were under a state of quasi-ownership by their fathers or husbands or some other male relative. The truth of the matter is that there could be no recognition of any meaningful human rights under feudalism for the feudal mode of production negated the recognition of the "lofty ideals and values" of equality.

Thus pre-colonial Africa knew and recognized no concept of human rights. Colonialism itself was also no respecter of human rights. Apart from Latin America perhaps, no other continent has suffered a more consistent negation of human rights than Africa. The transatlantic slave trade, colonialism itself (the worst manifestation of which is apartheid), racial discrimination and oppression, and the imperialist acts of plunder of Africa's natural resource have all combined to leave a sad and tragic trail of abuses of human rights in Africa. Although all, but two, of Africa's countries have been liberated from colonialism, the savage imprints of colonialism remain in virtually all such countries. As N. Rembe correctly points out:

Colonialism is a negation of human rights: colonial rule in Africa established and maintained itself by most ruthless measures that affronted the dignity of the African. . . .

The worst and most barbaric form of colonialism, apartheid, has been characterized by the international community as a crime against humanity. Those blacks who grew up in colonial Africa will readily understand the inhumanity of colonialism and racial oppression. Those of us who were born and grew up in racist Rhodesia are still haunted by the memories of the dehumanization and degradation to which our fathers were subjected to by an inhuman and cruel system of racism under which an elderly African man was commanded degraded and dehumanized by a system that allowed young white boys to treat Africans as sub-human things.

However, the crucial point that needs to be underlined is that colonialism, as a negation of human rights in itself, did not introduce human rights in Africa. This means that up until the time of independence African countries had no basis for and no history of the recognition and enforcement of human rights. The colonial state was by definition repressive, totalitarian and engaged in the systematic suppression of democratic institutions. One need go no further than the colonial state in Rhodesia and the present fascist state in South Africa, to illustrate this point.

Human Rights Conditions Under Post-Colonial States of Africa

It is futile to attempt to discuss the condition of human rights in Africa without an analysis of the type and nature of the state that has emerged in post-colonial Africa. The character of the state itself is invariably determined by the economic and political processes occurring in a particular country.

Firstly, the economies of practically all African states are dominated by imperialism which plunders their natural resources and extracts super profits through multinational corporations and transnational companies. Economic underdevelopment is the norm. These economies are characterized by the export of cheap primary commodities and the import of expensive manufactured goods. The peasants are often neglected, exploited and forced to grow cash crops like cotton, tobacco and cocoa in order to earn foreign currency to purchase consumer luxuries for the local bourgeoisie and petty-bourgeoisie who control the apparatus of state power. On the other hand, the African working class toils in multinational corporation owned industries, factories and other enterprises to scratch a miserable existence. The economic condition of the working class is often little better than under colonialism. The working class lives in dehumanising ghettos.

Mass unemployment, poverty, starvation, and disease loom very large in many African countries. This must inevitably be so if Africa continues to be dominated by imperialism through direct foreign aid and/or through the activities of transnational corporations. The role of transnational corporations in the exploitation of Africa is summarized by S. Maltsey in *An Illusion of Equal Rights*, op cit, where he states that:

"A sad result of the activity of transnational corporations is that the net profit exported from developing countries via the channels of private capital investment exceeds the sum increases of private investment in these countries economies."²³

The system of AID with its attendant debt problem which has become unpayable for most Third World countries further entrenches the dependence of African economies. It is now accepted that the United States of America earns 4 dollars in interest out of every single dollar it gives the Third World in the form of economic aid by way of loans.

This gloomy economic condition gives birth to a specific kind of neo-colonial state that expresses the general interests of the alliance of international capital, the local bourgeoisie and petty-bourgeoisie in the control of the state. This neo-colonial surrogate state is characterized by a political leadership that is alienated from the mass of the people. This gives rise to undemocratic constitutions founded on reactionary nationalism. Quite often the surrogate state assumes the

character of a military dictatorship because of the anarchic looting and unbridled corruption of the petty-bourgeoisie political parties which fail to control internal contradictions.²⁴

These kind of states are born out of the economic conditions occasioned by imperialism which exploits the mass of the African working people. The post-colonial state, being a surrogate state, depends for its survival on the repressive apparatus inherited from its colonial predecessor. These repressive apparatuses are readily used against the working people whenever they demand the abolition of unemployment, poverty, exploitation and fascist tendencies within the ruling cliques. As Von Freyhold has stated:

"The metropolitan bourgeoisie needs activist states on the periphery, states that are strong enough to suppress, by whatever means, growing social contradictions and states that can make foreign investments profitable and profits secure despite various unfavourable circumstances within the national and world economy."²⁵

Those states that serve the interests of foreign capital and those of the local bourgeoisie and petty-bourgeoisie must keep the working people and peasants under leash. Here the people are managed and controlled as an unconscious mass. Such states cannot resolve the acute problems of underdevelopment, hunger, starvation, unemployment and poverty. The people who suffer from all these problems inevitably agitate against their rulers who then use repressive methods to maintain their rule in alliance with foreign capital. It is against this background that gross violations of political and civil rights occur, not to mention economic and social rights which are totally negated by underdevelopment and economic dependence.

A few examples will suffice to illustrate the point. In Kenya, the national economy is managed entirely in the interests of international capital while the mass of the people are on the brink of poverty, hunger and starvation. The progressive intellectuals dissatisfied with the management of the economy have sought to challenge President Arap Moi's Government, which has reacted in the most savage manner, engaging in mass detention of its political opponents, torturing detainees, murdering University students and journalists. Any political dissension, even if it is within the narrow framework of the ruling party is labelled subversive and dealt with ruthlessly and swiftly. Trumped up charges are framed and brought against students and political opponents. A totally tamed and subservient judiciary routinely sends the opponents of the neo-colonial govern-

²⁴ See generally K Makumbe, "The question of Democracy and the Current Crisis in Africa", unpublished text of a paper written for the then Law Department, U.Z., Harare, 1986, pp. 2-5

²⁵ M. Von Freyhold, "The Post Colonial State and its Tanzanian Version Contribution to a Debate", in Othman Haroub, *The State in Tanzania: Who Controls it and Whose Interest does it Serve?*

ment to long terms of imprisonment.²⁶ In Zambia, not only are the working people constantly taking to the streets to protest against high prices of consumer goods, but the petty-bourgeois elements are also disenchanted with a "system where the management of the economy has led to chronic shortages of consumer goods and where the personal rule of the leader does not allow flexible change of direction to resolve the problems of the middle-class in the economy."²⁷ Within this scenario denials of human rights, detentions and other political intimidation are common place. Malawi has established a neo-fascist state which is no less ruthless than Amin's Uganda or Bokassa's Central African republic. In Malawi any form of opposition to the rule or policies of Dr. K. Banda, attracts executions by hired gangs. Most of Malawi's progressive nationalists either languish in jail or have been killed. Can one honestly speak of the protection of political and civil rights in a country characterized by the crude personal tyranny of Dr. Banda?

The list of undemocratic and neo-fascist African regimes is endless. One can immediately add Master Sergeant Doe's cannibalistic regime, the military junta of Mobutu in Zaire and Tanzania's One-Party dictatorship.

The political alienation of the mass of the people in African political systems results in direct threats to the continued rule of the executive office holders. To protect their offices the petty-bourgeois rulers either introduce neo-fascist one-party states or engage in the harassment of opposition parties which, in any case, often have the same policies as the ruling clique. K. Makamure vividly sums up the general scenario of African politics:

"In Africa, the bourgeois form of democracy has demonstrated itself to be the nearest thing to a political orgy. Election times turn out to be occasions for mass suffering. The petty-bourgeoisie political parties, which in conditions of neo-colonialism, each acquire financial patrons from among the multinational corporations whose behaviour in these times is identical to that of the punters at a race-course event, fight 'dirty' elections in which the game at stake has no agreed rules. The ordinary masses are used simply as voting fodder. Campaigns are organised through paid gangs of political hooligans so that political gang-warfare often erupts in which many working class, peasant and lumpen lives are lost. Election times are often open seasons for political assassinations where political opponents are physically liquidated. Ballot boxes in some cases are filled well before the actual voting commences . . . "²⁸

Realising their inability to grant or recognize and protect political and civil

²⁶ See the recent Constitution of Kenya Amendment Act 1988 which empowers the President to dismiss judges virtually at will.

²⁷ K. Makamure, *op. cit.*, p.5

²⁸ *Ibid*, p.7

liberties, African leaders and their theoreticians have invented a "developmental theory" that seeks to justify their violation of political and civil liberties. This "developmental theory" seeks to draw a dichotomy between civil and political rights on the one hand and socio-economic rights on the other by holding that the immediate task of Africa is to develop and in the process of pursuing such development, civil and political rights are a hindrance and nuisance that prevents the realisation of economic development which, as is argued, will satisfy socio-economic rights.²⁹ Having consummated this fallacious theory African governments are then at liberty to violate political and civil liberties for economic development that never comes. As S.B.O. Gutto has observed:

"The fallacy of this thinking lies precisely on the fact that *the control of the means of forces and production by minority ruling classes and imperialist monopoly capitalism in these societies make it impossible for development to take place at all and the little that is development is not for the masses who toil*. The level of political repression perpetrated in the name of development in these societies when added to the lack of attainment of socio-economic well-being total up to absolute suspension of human rights."³⁰

In concluding this part it ought to be stated that the scenario that has been painted above clearly shows most African countries as ready made theatres for mass violations and denial of human rights

HUMAN RIGHTS IN ZIMBABWE

Historical Background

Zimbabwe was occupied by Britain in 1890 and thereafter the colonial settlers engaged in a series of brutal wars and mini-wars against the indigenous African peoples who attempted to resist colonialization. African resistance was crushed and the colony of Southern Rhodesia was established under the British Crown. Under colonial rule Africans were denied participation in the political affairs of the country. They were denied the right to vote, herded into infertile Native Reserves (later euphemistically called Tribal Trust Lands) where they scratched a miserable subsistence existence. They were often plagued by diseases, hunger, poverty and starvation.

Those who left their allocated Tribal Trust Lands to work in the mines and towns were paid pitiable starvation wages. All sorts of discriminatory laws were

²⁹ See A.G. Mower Jr, "Human Rights in Black Africa: A Double standard?" 9 *Human Rights Journal* 39 (1976)

³⁰ S.B.O. Gutto, "Responsibility of States, Transnational Corporations and Individuals in the Field of Human Rights to Social Development: A Critique." Unpublished paper written in London, 1983, for the Centre for African Studies, SDAS.

passed against them³¹ they were segregated against in a manner only slightly better than the present day blacks of South Africa. Their land was appropriated, their cattle taken away by the emergent white settler State. The process of colonialization and dispossession of the African people was fundamentally dehumanizing and constituted a total negation of human rights: a negation more crude and brutal than that of the hitherto existing feudal despotism.

In brief, what can be said is that the process of colonization was aggressive, brutal, bloody and inhuman. The white settlers having herded the African people into barren Tribal Trust Lands built up a formidable settler state whose main functions were to develop capitalism under conditions which kept the African population in subjugation. Through the racial ideology of white supremacy the settler State mobilized all white settlers against blacks, who were forced to eke out a miserable existence.

The scenario in Rhodesia was thus one where seven million blacks scratched out a living at far below acceptable levels of poverty while some 287 000 whites, barely 3 percent of the population, enjoyed all the national wealth and the attendant privileges. The white minority, apart from being in sole control of the political processes, owned more than half of the country's arable land, all of the meaningful businesses and industries and controlled all other spheres of social life. Blacks were confined by law and force to bleak urban townships and barren rural Tribal Trust Lands or squalid worker's quarters on white commercial farms in which thousands of black children were undernourished.

This unjust and racist social structure was at the heart of the armed liberation struggle which lasted for 7 years and cost a minimum of 40,000 lives. The war was of such brutality and savagery that very few families remained untouched by it. The brutality of the Rhodesian army against the black population during the armed struggle for independence is well documented and needs no recital. Suffice to say that the Rhodesian fascist army executed African people en masse, detained and tortured its opponents at will. There are very few, if any, African leaders who were not brutally tortured under Smith's regime which forceably confined several thousands of peasants into "concentration camps" as part of its strategy to deny guerrillas of the nationalist movement access to food.

Smith's Rhodesia which received moral, political and material support from virtually all imperialist countries, built up a formidable, cruel and savage army, police force and intelligence service to defend settler rule settler state. This apparatus of the settler state routinely violated and abused human rights without any accountability, since such abuses and violations were part of State policy against the African population. However, what is significant is that when Zimbabwe eventually obtained its political independence in 1980, it had gone

³¹ See for example, the Constitution of Southern Rhodesia, 1961; the Land Tenure Act, Chap. 148 the Electoral Act, cap. 5, the Industrial Conciliation Act, Chap. 267 and African Education Chap. 233.

through a brutal war of national liberation during which there was total non-recognition of human rights.

Virtually anything could be done under the vague notion of protecting state security and maintaining law and order.

The Independence government was faced with an unenviable task of building a nation out of the ruins of war. The new Government's first task was to dismantle the racist and authoritarian institutions of colonial Rhodesia. In addition, it had to undo a vast network of security apparatus that had routinely detained Africans, tortured them, invaded their privacy and subjected a great number of them to summary executions. It had to deal with the problem of the material and economic deprivation of the Africans that had been occasioned by colonialism. The ZANU (PF) Party Programme clearly recognised these tasks and hence proclaimed that:

"There shall be recognized equality between all persons men and women. Persons of all colours, culture and backgrounds who identify themselves with a socialist Zimbabwe will have expanded opportunities to contribute fully towards the country's development and to fulfill their own aspirations as human beings. No one will be permitted to exploit other free and equal citizens for his own benefits . . .

Broad democratic freedoms—speech press, assembly, association, movement—which have been taken away from the people of Zimbabwe by the settlers will be restored and guaranteed in all citizens of a free, democratic, independent and socialist Zimbabwe. *All political detainees and restricties will be released on the first possible occasion and reunited with their families. Existing concentration and detention camps will be closed and the buildings turned into adult education centres.*

. . . All the means of production and distribution will be placed fully in the hands of the people of Zimbabwe as a whole. The present capitalist economic system. . . will be abolished. . .

All the natural resources of Zimbabwe — the land, mineral, water, flora and fauna — belong to the citizens of Zimbabwe today and forever afterwards. *Therefore there can be no private ownership of land and natural resources because they belong to the people as a whole. . .* " (emphasis added) (See ZANU Political Programme, No. 2., 1973, at pp.21–27

Accordingly, the new government was expected to solve the problem of peasant landlessness, working class exploitation and deprivation and to satisfy the broad economic needs of the people. In the background stood the apartheid regime constituting a threat to the sovereignty and independence of Zimbabwe. The new Government having inherited the settler colonial state intact had to

entrust the defence of the new Government to an army, an airforce, a police force and an intelligence organisation that had strong links with S. Africa and whose loyalty to the new order was highly questionable. Faced with the ever present possibility of an attack from S. Africa, the new government made great strides in integrating the three main armies that had fought in the liberation war.

There was the Zanla army, the ZIPRA army, and the Rhodesian army. This delicate task was successfully carried out and indeed the fact that it was done so successfully remains one of the greatest achievements of Zimbabwe's independence government. At the beginning very few believed that it could be done.

However, the process of integration was not always smooth. Mistakes were made, particularly in the treatment of ex-ZIPRA combatants who thereby became disenchanted. Some of them, together with some elements of Muzorewa and Smith armies found a ready ally in South Africa which sponsored them to start a destabilization war in Matebeleland. However the majority of ex-ZIPRA combatants spurned South African attempts at wooing them and started their own "dissident war" against the government, destroying equipment, burning stores, buses and homes, murdering and maiming people mostly in Matebeleland and some parts of the Midlands. The new government had to respond to this threat that challenged its legitimacy. No responsible government could have allowed itself to be held to ransom by bandits and dissidents whatever legitimate grievances they may have had to take up arms. It is in exercising this legitimate right to defend the sovereignty of Zimbabwe that the government of Zimbabwe has been consistently indicted for grave violations of human rights in Matebeleland and some parts of the Midlands.³²

The Post-Independence Period

(i) Socio-Economic Rights

The Lancaster House Constitution, like all bourgeois Constitutions does not recognize and guarantee socio-economic rights. Consequently, there is no legal framework within which the question of socio-economic rights can be discussed in Zimbabwe. As already outlined above the colonial socio-economic structure denied the majority of Africans virtually all socio-economic rights. They were denied access to arable land, denied equal and quality education, denied decent housing, denied adequate health facilities and denied access to employment. As a result most Africans were generally poor and lived in unproductive rural areas and bleak urban townships.

The attainment of independence was, thus, seen by Africans as a first step towards the eradication of all these colonial evils. The independence government has achieved some degree of success, within the limits of capitalism, in addressing the question of socio-economic rights. Educational opportunities

³² The security problems and the attendant violations of human rights that plagued Matebeleland and the Midlands between 1982 and 1987 are discussed *infra*.

have been greatly expanded, with primary education being (in theory at least) compulsory and free. An attempt has been made to expand health facilities and services to all sections of society under a National Health System in which low income persons have a right to free health services. For the employed minimum wages, which did not exist in Rhodesia, have been introduced and enforced for various categories of workers. However, the minimum wages have been continually eroded by the always increasing prices of consumer commodities needed by the working classes for subsistence.

However, the success story ends there. Otherwise the working class continues to live in bleak and overcrowded urban townships, now styled high density suburbs. The peasants remain in the overcrowded and unproductive Tribal Trust Lands, now styled Communal Lands. Eight years after independence, only 40 000 families of the original target of 162 000 families have been resettled.³³ More poignantly, the land question remains unresolved due to a variety of reasons, all of which have their roots in the maintenance of capitalism. The level of unemployment has reached crisis proportions. In short, the fundamental questions that were posed by all progressive elements at independence remain unanswered. How will the government liberate the "new state" from its external dependency and capitalist development? How will the government deal with the land question and how will it deal with the problems of mass unemployment and general poverty?

The Lancaster House settlement represented a great setback for the revolutionaries of the Patriotic Front alliance because it determined that the socio-economic structures of colonial Rhodesia would remain intact. The protection of the inviolability of private property by the Constitution meant that the new government could not legally expropriate landed property and redistribute it to the dispossessed Africans.³⁴ The protection of private property meant that the land question, which was one of the primary issues of the liberation war, would remain unresolved. Commenting on this issue Andre Astrow says:

"The extent of the compromise by the PF leaders can be measured by those sections of the Constitution referring to the crucial land question. As one authority on land points out the cost of buying the estimated 40–60% of European land not being fully utilized would be so high that even if a new government of Zimbabwe were committed to implementing a comprehensive land resettlement programme *under the constitution it would find it well nigh impossible to carry out.*"³⁵ (his emphasis)

³³ See T.B. Ndoro, "The Land Question—Seven years after" *Journal for Social Change and Development* No. 18 1987 p. 22. See also the 1980–90 Five Years Development Plan.

³⁴ See Section 16 of Zimbabwe's Lancaster House Constitution.

³⁵ Andre Astrow, *Zimbabwe: A Revolution that Lost its way?* Zed Press, London, 1983, at p.155.

This difficulty has meant that the socio-economic rights promised by political independence have remained a distant dream for the majority of peasants who were, deprived of arable land by the colonial settler state. The working class have fared no better in terms of fundamental socio-economic rights. Imperialism through multinational corporations and the vicious system of international AID has kept its grip on the economy of Zimbabwe. It could not be otherwise, as I. Mandaza says:

"The post-white settler State is inherently unable to fulfill the popular demands of the masses."³⁶

The greatest beneficiaries of independence have been the white and black bourgeoisie and the petty-bourgeoisie of all races whose opportunities, under secure conditions of peace, have greatly expanded. I Mandaza puts it thus:

"In Zimbabwe today, we have a post-white settler colonial State in which the former settlers find themselves with such political and economic guarantees as would be the envy of any former colonisers in any decolonization process. Equally important, however, is that this situation in itself provides a framework for development and expression of class forces among the African people themselves, particularly the African petit bourgeoisie which has a vested interest in the post-white settler colonial state."³⁷

(ii) *Political and Civil Liberties*

Independence brought an end to the brutal savagery of the authoritarian colonial regime. It expanded political and civil liberties in the sense that, the country, with the exception of Matebeleland and some parts of the Midlands, has been at peace and people have been free to participate in the political processes in the country and also free to move about their business unharassed since the end of the war in 1980.

However, mainly because of the external threat from South Africa and the internal threat from various political elements including the possibility of a white rebellion at independence the new government had to maintain some kind of strict security apparatus. The government chose to keep virtually intact the security agencies inherited from Rhodesia. The legal State of Emergency under which these security agencies had violated and abused human rights was renewed in 1980 and has been extended for various security related reasons in the present day.

During the colonial period there was no justiciable Bill of Rights in Rhodesia.

³⁶ I. Mandaza, (ed) *Zimbabwe: The Political Economy of Transition 1980-1986*, Codeseria, Dakar, 1986, p.25

³⁷ *Ibid*, p.3

The Lancaster House Independence Constitution introduced a justiciable Bill of Rights contained in Chapter III of the Constitution. This Bill of Rights incorporates generally all the civil and political liberties, namely, the right to life, liberty, security of the person, protection of the law, freedom of conscience, of expression and of assembly, freedom from torture, inhuman and degrading treatment, and protection of privacy and property.³⁸ The usual exceptions to these rights are included in the Constitution.

What falls for discussion is the extent to which these fundamental typically bourgeois rights, have been protected and respected in Zimbabwe since independence. The issue cannot be adequately canvassed outside an understanding of the political and military conflict in Matebeleland which has only been recently resolved after the achievement of unity between ZANU(PF) and (PF) ZAPU.

The political question in Matebeleland was directly linked to the disunity between ZANU(PF) and ZAPU which disunity reached its high watermark in 1982 with the discovery of large quantities of arms in properties then owned by ZAPU. The ZANU(PF) government accused ZAPU of having plotted to overthrow the government and dismissed some ZAPU members from the Cabinet. The dismissal of some ZAPU members from the Cabinet increased the pace of defections from the army by former ZIPRA cadres. The defections had started at a modest pace after the Entumbane clashes between ZANLA and ZIPRA forces in early 1981. The treason trial of the war time leadership of ZIPRA also increased the number of former ZIPRA elements taking to the bush either after defecting from the army or after demobilisation.

The dissidents started a mini-war in Matebeleland and some parts of the Midlands. The government laid full responsibility for the operations and activities of dissidents on ZAPU, which in turn, consistently denied that it sponsored the dissidents. However, there was never any doubt that dissidents fought in the name of ZAPU and identified their cause as the expulsion of ZAPU from government and the illtreatment of ZAPU members by government. What has never been established is the extent, if any, to which the leadership of ZAPU and the ZAPU party structures sympathised with, and supported dissidents.

In this scenario of disunity and animosity between ZANU(PF) and ZAPU, numerous ZAPU politicians and supporters, together with former ZIPRA cadres both within the army and those demobilized were rounded up and detained under suspicion of aiding and abetting dissidents.

More damaging, however, was the cost of the dissident war in Matebeleland. The damage caused by dissident in Matebeleland and some parts of the Midlands was brutal and extensive. Between 1983 and April 1988 (when the government granted dissidents an amnesty under which virtually all of them surrendered to

³⁸ See sections 11-23

the police) the government reported no less than 750 murders, most of them ZANU(PF) officials, committed by dissidents in the affected regions. Dissidents extensively damaged and destroyed government property. By early 1985 no less than 400 000 acres of commercial farmland had been abandoned by white farmers fearful of their lives. In May 1987 alone dissidents murdered 4 white farmers in the Midlands Province. Towards the end of 1987 a group of dissidents callously hacked to death about a dozen missionaries and their families in the Esigodini area of Matebeleland South. It is within the above context that government sent troops into Matebeleland and some parts of the Midlands. In its attempt to deal with dissidents the government used a variety of tactics which included the imposition of curfews and detentions. These military actions, carried out between 1983 and late 1986 gave rise to accusations of gross violations of human rights by the government. On March 26, 1983 following these military operations the Catholic Commission for Justice and Peace issued a statement which alleged that there was "clear evidence" of severe violations of human rights in the operational areas. The Catholic Bishops' Conference followed this up by issuing a pastoral statement on March 29, 1983 which stated that:

"We entirely support the duty of the government to maintain law and order, even by military means. What we view with dismay are the methods that have been adopted for doing so. Methods which should be firm and just have degenerated into brutality and atrocity . . . Violent reaction against dissident activity has, to our certain knowledge, brought about the maiming and death of hundreds and hundreds of innocent people who are neither dissidents nor collaborators. . . The facts point to a reign of terror caused by wanton killings, woundings, beatings, burnings and rapings. Many houses have been burned down. People in the rural areas are starving not only because of the drought, but because in some cases supplies of food have been cut off and in other cases access to food has been restricted or stopped.³⁹

Other allegations of grave violations of human rights in Matebeleland came from Amnesty International which has, since 1983, consistently issued reports of abuses of human rights in Zimbabwe. The World Guide to Human Rights, published by the Economist Magazine, in 1986 put Zimbabwe's human rights rating at 45% as against a world average of 55%.

Perhaps the most comprehensive and detailed account of alleged human rights violations in Zimbabwe between 1983 and 1985 is to be found in *ZIMBABWE: Wages of War' a Report on Human Rights* prepared by the Lawyer's Committee for Human Rights and published in May, 1986. The Report gives accounts of numerous mass executions, harassment, detentions and detailed narrations of kidnappings and torture which make terrifying reading. Suffice to quote from pages 29-30 of the Report:

³⁹ Catholic Pastoral Statement, dated 29 March, 1983.

"The abuses have included mass detentions without charges, tortures, rape, beatings, abductions, unwarranted searches and seizures, the looting and destruction of private homes, and the extra-judicial execution of an estimated 1,500 civilians, perhaps many more."

On its part the government of Zimbabwe always denied these allegations. However, what is important is that the military operations that gave rise to the allegations of human rights violations in Matebeleland have now ceased since the conclusion of the unity accord in December, 1987 between ZANU(PF) and ZAPU. The unity agreement led to the Presidential Amnesty, announced on 19 April, 1988. Under the Amnesty the government pardoned all dissidents who surrendered to the police before or on 31st May, 1988. All dissidents, responded to the Amnesty and surrendered. Peace has now returned to Matebeleland and the Midlands.

Judicial Pronouncement on Human Rights Violations

While there has been persistent allegations of unlawful executions, killings torture and political kidnappings, very few cases related to these allegations have come to court. Two murder cases, related to or connected with military operations in dissident affected areas, have come before the courts. The first case came before the High Court as a result of an inquest verdict of a Bulawayo Magistrate, George Geddes who had found that an off-duty army officer, Lieutenant E. Ndlovu, his wife and two civilians, who had been travelling from Hwange to Bulawayo had died as a result of bayonet wounds inflicted on them by four members of the army who were carrying out military operations in the Lupane area of Matebeleland. The High Court found the four accused guilty of murder with actual intent and sentenced them to death. On appeal to the Supreme Court the verdict of the High Court was confirmed, the Supreme Court observing that:

"What was established was that the appellants abducted the four unfortunate and innocent deceased from the petrol station (in Lupane) and, after subjecting them to torture and the two females to some degrading form of sexual abuse — they slaughtered them in the most atrocious, cruel and cold-blooded manner."⁴⁰

The second case occurred in the Lower Gweru area in October, 1984. Briefly, what happened, according to the findings of the Supreme Court, was that a prominent ZANU(PF) official and his wife had been brutally murdered by dissidents.

"At his funeral which was attended by the Governor of the Midlands Province, the late Benson Ndemera and the Officer-in-Charge of Gweru Rural Police, Inspector Wurayayi inflammatory speeches were made and instructions given that dissident collaborators were to be killed and reprisals were to be undertaken.

⁴⁰ S. Chayana, C. Simango, G. Chihwayi, and J. Gwatirera v State SC. 42/62 at p.5.

Immediately after the funeral a large number of huts were set ablaze. [Presumably belonging to suspected dissident collaborators]. . . . More significantly, however, it is alleged and again not denied by the State, that one Peter, suspected of leading the dissidents to the house of the murdered couple was shot there and then more or less in the presence of the authorities, and nothing was done to arrest his killer."⁴¹

After these horrifying events the two accused, who were members of the Special Constabulary, by their own admissions:

shot to death [one Patrick Sibanda] a man who had been captured by others and was in their power. They did so quite deliberately and openly. The unfortunate deceased was forced to lie on or near some bushwood which had been collected in a donga. He was then shot at several times by both appellants, who then with their companions set the wood on fire and partially destroyed the body."⁴²

On these facts the accused were tried and convicted of murder and sentenced to death by the High Court. However, on appeal, the Supreme Court while confirming the convictions changed the sentence from death to twenty years imprisonment finding extenuating circumstances in that:

"the moral blameworthiness for this murder, at least on the evidence placed before the court, attaches to persons other than appellants. These persons were vastly senior to the appellants, both in the police sphere and in the political sphere. Their influence and authority would seem, even if the evidence is exaggerated, to have been wickedly abused."⁴³

It ought to be underlined that the State brought those accused of these heinous crimes and violations of human rights to the courts and were dealt with in accordance with the ordinary laws of the country. This is a positive factor that is worth noting, notwithstanding that in the latter case the courts thought there were others who carried more moral responsibility for the crimes.

There have also been judicial findings on torture of arrested persons.⁴⁴ The most famous case is the case of the *State v Slatter and Others*, HC-H-315-83, where the accused were acquitted on the basis that the confessions they had made to the police were inadmissible. In the course of his judgment Dumbutshena, J. (as he then was) observed that:

"The psychological effects of lengthy interrogation incommunicado

⁴¹ *I. Mutsunga and L. Gaba v the State* S.C. 36/87 at p.2. 42.30.

⁴² Ibid, p.1

⁴³ Ibid, p.10

⁴⁴ Torture is absolutely prohibited by section 15 of the Constitution and this prohibition cannot be derogated from even during a State of Emergency.

incarceration and torture suffered at the hands of the police drive an accused to hopelessness.”⁴⁵

Other cases where allegations and findings of torture have been made include *Granger v Minister of State*, SC 83/84, *The State v Sibindi*, Case No BRM 37/84 and *S. Nhari, A Dhlokhlo, a Vundhla, F. Nyoni, Amos Moyo and Albert Moyo v The State*, SC 9/87

A rather disturbing and astonishing case is the case of *S. v Joseph Makando and others* (an unreported case tried by the Bulawayo High Court, in July, 1986) in which the four accused were tried for the murder of Senator Ndlovu who had been murdered by armed gunmen at his home in Beitbridge during political disturbances. The accused challenged the admissibility of their unconfirmed, warned and cautioned statements on the basis that they had been assaulted and tortured by the police to compel them to make the confessions.

In the ensuing trial within a trial a then senior magistrate now Regional Magistrate, Mr Lawrence Kamocha, testified for the defence and gave evidence that the accused had appeared before him for confirmation of the statements and he had refused to confirm the statements because the accused had clearly been severely and brutally assaulted. The evidence also showed that upon Mr Kamocha's refusal to confirm the statements the police had taken the accused to a Gwanda magistrate who had also refused to confirm the statements and ordered the accused to be examined at a nearby hospital. This case is disturbing and astonishing because the police had the cynicism, arrogance and persistency to seek two different magistrates to confirm statements while the accused before them showed clear signs of severe assault. The High Court, correctly, it is submitted, found the statements inadmissible and acquitted the accused.

It may also be noted that there is currently pending in the High Court a case against the Minister of Home Affairs, the Minister of State security and the Director of Prisons instituted by about a dozen families from Silobela (Midlands). The action seeks to compel the defendants to produce or disclose the whereabouts of certain men who were allegedly arrested by some security officers during 1985. The plaintiffs allege that people using vehicles similar to those used by security officers “arrested” or “abducted” the persons who have been missing since 1985. The defendants have denied any involvement or knowledge of the whereabouts of the missing persons.

Yet another astonishing and frightening case is that of *Banda v Minister of Home Affairs and A.N. Pagiwa and N Mhunhira*, HC-H-243-87. The total incredibility of the facts of this case which amount to an unparalleled abuse of power by rouses and sadists in police uniforms and clothed with legal authority requires that we quote the facts in full as provided in Sansole J's judgment. The plaintiff, a mother of four children, lived with her boyfriend, one Claude Hang, at her house in Greendale, Harare.

⁴⁵ At. p.10.

"On the 6th of March, 1985, Hang was arrested by the police on charges connected with possession of or dealing in Mandrax.

As a result she was taken in by the police for questioning. She was questioned by the Second and Third Defendants. They first took her, in her own car, to her house in Greendale where she picked up a blanket. Thereafter, they proceeded to Machipisa Police Station and then proceeded on to Southerton Police Station. And there she was made to spend the night in her car wrapped in a blanket. Thus, from then onwards she was subjected to persistent harassment and illtreatment by both Defendants and to degradation by the Third Defendant, in particular. She was wrongfully and unlawfully imprisoned by both Defendants during the following periods:

	<i>Total No. of Days</i>
(a) From midnight 6th April 1985 to 15th April 1985	9
(b) From 17th April to 19th April, 1985	3
(c) From 24th May 1985 to 15th June, 1985	23
(d) From 8th July 1985 to 9th July, 1985	2
Total number of days	<hr/> 37

The prime mover, star villain and rouge was the Third Defendant. Initially, he harassed her over Hang. He wanted her to give information on Hang. Subsequently, he harassed her for his own selfish ends. He was given to contacting her by telephone and telling her to call at the police station. When she did, he would question her about mandrax and detain her at the police station until knocking off time. Then he would tell her to drive him places, in her own car. She was coerced into obliging him for he had made it quite plain to her that refusal would be visited by having her locked-up in police cells.

On the 6th April, 1985, she received a telephone call from both Defendants in which they informed her that they were coming to fetch her and have her locked up. They duly did. They took her away to Norton Police Station and had her locked up there. She was being accused of being in possession of Mandrax. She remained in cells until the 11th of April, 1985. During this period both Defendants interrogated her and inquired whether she was then ready "to talk". When she indicated that she had nothing to say, they removed her from Norton and took her to Waterfalls Police Station, in Harare and there they detained her in cells until the 15th April, 1985. During this period, and once again both Defendants visited her at the cells. She pleaded with them to allow her to send some money to her children. They collected the money from her and went to give it to her children. She was later released from the cells on the same day.

On the 17th April, 1985, the Second Defendants called for her at her place of employment, a commercial bank, and took her to the Central Police Station. He told her that she was going to be locked up. However, she was merely detained at the offices.

In the evening the Third Defendant and another police detail took her to Southerton Police Station and there the Third Defendant had her locked up. She remained in cells until the 19th April, 1985, when she was released. On the 21st April, 1985 both Defendants called at her house. They said that they wanted to take her away with them but, later, they decided against it and suggested that she call on them, the following day, at the Central Police Station. She duly did. She was detained at the offices until 5.00 p.m. when she was taken to Waterfalls Police Station. The Second Defendant and another Police detail used one car and the Third Defendant used her own car. When they were in the car, the Third Defendant revealed to her that if she did not wish to be detained, she should agree to sleep with him. She took offence at the suggestion because she did not like the Third Defendant at all. She dithered. And then, the Third Defendant made a remark to this effect. Well if you do not want then I will go and, lock you up. As a result she was constrained to acquiesce for fear of being locked up. In addition, she was influenced by the concern for her children who had been left alone at home and the fear of losing her job for her employer had already suggested that she resign because of these frequent arrests and consequent absences from duty.

Ultimately, they arrived at Waterfalls. The Third Defendant left her in the car and went to speak to the Second Defendant and returned later and uttered words to this effects —

It is okay, you won't be locked up now.

Thereafter, they proceeded to Highfield, where she dropped him off at Machipisa Shopping Centre. On the 1st May, 1985, she received a telephone call from the Third Defendant. He told her to come and fetch him from a certain hotel, which is somewhere along Salisbury Street. She went, though she had protested to him that she had visitors. They drove down Beatrice Road and proceeded to Chitungwiza and called at Nyamutamba Hotel, where he booked a room and had sexual intercourse with her. She says that she felt terrible. I felt hate for him. They whiled away time in the room until about 2.00 a.m., when she complained that it was getting too late, she had to get back home. They drove away and she dropped him off at Highfield and she proceeded to her house.

On the 8th May, 1985, he once again summoned her to come and pick him up at the same place along Salisbury Street. She did. He told her to proceed to Waterfalls to his niece's house. They remained there

until about 10.30 p.m. She assumed that he would want to be dropped off at his house. This was not to be so. Instead, he insisted that she take him to her house and spend the night with her. She protested saying that this would cause her embarrassment with her children. He was not concerned. Instead, he warned her that if she were to refuse he would have her locked up. In the result she was constrained to acquiesce. That night he once again, had sexual intercourse with her. In a bid to spare her children the embarrassment, she sent them away by bus, early in the morning.

On the 11th May, 1985, he summoned her to come and pick him up at Salisbury Street. She did. He then told her to drive him to Chihota Communal Lands where he sought to buy cattle. There were no cattle for sale. And so he told her to drive him to his communal home in the same area. Upon their return, he insisted that he spend the night with her at her house. They had sexual intercourse. Once again, in a bid to save her children from the embarrassment, she sent them away, by bus, early in the morning. He spent that morning with her until afternoon, when he told her to drive him to Highfield. On the 18th April, he summoned her to pick him up at an hotel in Highfield. When she resisted, he reminded her that but for him she would be in Chikurubi Prison. Thus she acquiesced. She drove him to his niece's place in Waterfalls, where they had some drinks. Afterwards, he said that he wanted her to take him to her house and spend the night. Since she had some drink, she plucked up courage and refused. An argument ensued in the car which lasted from about 10.30 to 1.00 a.m. When he realised that she was adamant, he became belligerent and pulled her out of the car by her hair and twisted her head round and caused her to fall face down. He put his foot on her back and pressed her hard to the ground until she experienced some difficulty in breathing and at the same time he continued twisting her head by pulling her hair. He laughed as he did it. She feared for her life because of the intensity of the brutality and the cynical manner in which it was perpetrated. In the result, she conceded defeat. He put up at her house and had sexual intercourse with her. Early, in the morning she arranged for a taxi to call and pick him up.

By this time she had become desperate. Thus on the 20th May, 1985 she resolved to go and see the Minister of Home Affairs.

She contacted his office by telephone to make an appointment. She was not able to secure an appointment over the telephone. She called in person at the Ministry the following day. In the afternoon both Defendants called in person at her house. The Second Defendant declared that he had come to apologise on behalf of the Third Defendant for what he had done to her on the 18th May, 1985, namely the assault. She called the Second Defendant aside and informed him that she feared that the Third Defendant may kill her. He assured her that

he would see to it that, that was not to happen. At this juncture the third Defendant got out of their car and protested at the private discussion that was taking place and claimed that after all, they had merely come to tell her that she was to call at the police station the next day. They left.

The following day they called at her place of work. In her presence the Second Defendant announced that the Third Defendant was threatening to have him transferred to another department. She decided against going to see the Minister of Home Affairs because she was now of the belief that it would be pointless, to do so, as the Third Defendant had always bragged to her about his strong contacts with the Minister. She feared that the Minister might tell on her to the Third Defendant.

On the 23rd May, 1985 the Third Defendant contacted her by telephone and summoned her to come and fetch him at the same place and in the usual manner, after working hours, she did.

They drove to the Harare Kopje and parked there. Thereafter, they drove toward Highfield. She assumed that he wanted to be dropped off there. However, this was not to be. Instead, he demanded that she take him with her to her house. She protested but in vain. En route, he indicated two houses to her and declared that behind them, there was a house in which a certain woman lived. He claimed that he had bludgeoned her to the extent that she was now mentally confused. As a result, she felt scared and threatened. And as if to drive the point home he uttered to her words to this effect —

An ambulance will pick you up beside your car and if you are lucky you would wake up in hospital.

As a result when they got to the first bus stop into Highfield, and whilst the car was in motion she opened the door and jumped out, in a desperate bid to get away from him. He made chase after her. As it was at a bus stop people were milling around. She sought refuge and shelter behind a certain man. Yet this did not deter him. She was shouting for help saying "Somebody please help me". Someone who she believed to be a policeman produced his identity and showed it to the Third Defendant, but to no avail. He continued to pursue her until he got hold of her and took her back to the car. She felt helpless and humiliated. When they got back to the car he said words to this effect—

You have no power over me. I work for the Minister of Home Affairs.

He made threats and then assaulted her with an open hand. He threatened to have her locked up for the night and then taken to the Drug Section the following morning. Thus she acquiesced and they

proceeded to her house where he spent the night and had sexual intercourse with her. He left the following morning by taxi. She then saw him again the following day. He came to her place of employment with the Second Defendant. They then left and told her that they were proceeding to Bindura to see Hang, her lover. It happened that she was also proceeding to Bindura that same day. Upon arrival at Bindura, they followed her to the prison and threatened to have her locked up because they claimed that she had come to Bindura to interfere with their investigations. Indeed they had her locked up at Bindura Police Station. They left her there until the following Monday, the 17th of April, 1985. Whilst at Bindura she consulted with one Inspector Madoro. She told him the whole story. When the Third Defendant arrived some two hours later, she was called from the cells. A quarrel ensued between him and Inspector Madoro. He was complaining that Inspector Madoro had no right to speak to her in his absence. Inspector Madoro warned him to be careful lest she put him into trouble. He said that he had nothing to fear because after all the Minister knows all about it. Thereafter, he took her to Norton Police Station in a police vehicle. Her car was left at Bindura. On arrival at Norton, he changed his mind and drove to Highfield where he picked up the Second Defendant.

Then they wanted to drive to her house but she resisted. He threatened to have her locked up at Hatfield Police Station and so they proceeded there. On arrival, he changed his mind and decided that he was going to keep her hostage until after they had seen the Minister the following day. Thus they proceeded to her niece's place in Waterfalls. They were both put up for the night at his niece's place and she slept with him.

The Second Defendant called at the niece's place the following day to pick them up. They proceeded to her house, where they washed and changed in readiness to go and see the Minister. Whilst she was having a bath she heard the Third Defendant make a telephone call. She picked up the receiver of the extension and listened in.

She heard him speak to a lady at the Ministry and claiming that she was his girlfriend whom he had arrested and that she was threatening to report him to the Minister. In the result he was coming there with her.

As they were driving into town to see the Minister, a quarrel ensued between her and Third Defendant over whether or not she should consult with the Minister. Then and there the Third Defendant told the Second Defendant to drive to Rhodesville Police Station, where he locked her up in cells. She remained there until the 1st June, 1985. Thus she was under his control from 24th May, 1985 to 1st June 1985.

On the 1st June, 1985 she was moved out of the cells and taken to Mabvuku Police Station where she was detained for a week up to the 7th June. Then she was moved to Hatfield Police Station, where she was further detained until the 14th June, 1985. They took her out and drove to Norton for further detention. However, they changed their minds and proceeded to Bindura. They wanted her to talk to Hang about the whereabouts of Mandrax. They sought her to do the talking whilst they were eavesdropping. They had hoped to have him trapped. It did not happen. Thereafter, they drove her back to Waterfalls where they had her locked up in cells, until the next day when she was released. She collected her car from the Central Police Station, on the 17th June, 1985. During this entire period from the 24th May to 15th June, she was not taken before a magistrate. Then there was a lull until the 5th July, 1985, when the Third Defendant contacted her by telephone seeking to know what he thought she had told Hang's legal practitioner. He summoned her to meet him at Amato Centre, in Julius Nyerere Way. Upon arrival he got into her car and told her to drive to Chitungwiza where he booked a room at Nyamutamba Hotel. They spent the night there together. He had sexual intercourse with her. The Second Defendant called at the hotel, he required her to return to the hotel that same day, she did. And the Third Defendant detained her there overnight. Once again, she had sexual intercourse with him.

On the 8th July, 1985, both Defendants picked her up at her home and detained her in cells at Rhodesville Police Station until the following day when they took her to make a statement incriminating Hang. She declined to do so saying that she had nothing to say. The Third Defendant told her what to say in the Statement. She did, because they had threatened to make her a co-accused with Hang.

Later in the day the Third Defendant demanded to spend the night with her at her house. She protested saying that her grandmother was at home. He was not concerned. He slept with her. She felt embarrassed and humiliated.

On the 11th of July, 1985, the Third Defendant, once again, spent the night with her at her house and had sexual intercourse with her.

On the following day, she consulted a legal practitioner, who arranged for her to make a sworn statement before a Magistrate. In the company of this legal practitioner, she went to make a complaint at the Police Headquarters and she saw one Mr Muchemwa. He referred her to the General Police Station. That night the Third Defendant had summoned her to meet him at what had now become the usual place. She did not turn up. She was put up at a friend's place in Eastlea.

The following day, the Third Defendant called at her place of work and remonstrated with her. Then and there he started chasing her

around in the office and within the glare of her workmates. Eventually he grabbed and dragged her away and they went to the Police Headquarters. They saw a very senior officer, one Mr Chingoka. Mr Chingoka told the Third Defendant, that the police were looking for him and that he should let her go. He did not respond. Instead, he told Mr Chingoka that he wanted to have her locked up. So an argument ensued between him and Mr Chingoka just gave up and left her at his mercy. She was crying. Subsequently, he let her go. On the 15th of July, 1985, she found him waiting for her at her place of employment. He had come to take her to court. She appeared in court on a charge of possession of mandrax. She was remanded in custody but was later admitted to bail. Thereafter, she appeared in Court, regularly, for further remand until a magistrate put a stop to it for want of prosecution, on the 5th August, 1986.

These many acts of sexual intercourse to which she was obliged to submit under duress caused her mental anguish and distress. They made her feel used and degraded.

It is upon these facts that Plaintiff is basing her claims. In my view, it is a harrowing account of an untrammelled abuse of power by rouges and villains."⁴⁶

That such abuse of power, such flagrant violations of human rights can happen right in the capital of Zimbabwe and go on for such a long period is extremely frightening. Indeed, that the police force has among its ranks such rouges and sadists is astonishing. The facts of this case would be shocking even if it had happened in a fascist state, let alone in a democratic country.

However, what is most disturbing is that the concerned police officers have not so far been prosecuted for their astounding abuse of power and for their criminal acts against the plaintiff. If such things can happen and go unpunished by the State how can people have confidence in the country's justice system? The plaintiff's consolation is that Sansole J, awarded her damages of \$18 500 for wrongful imprisonment, \$1 500 for assault and \$8 500 for rape.

The facts of the case of *S v Charowa* which was tried in the High Court recently, but in which no judgment has as yet been passed, also call into question the effectiveness of the police in protecting the people. The facts, as presented by the State, were that during political disturbances in Kwekwe, sometime in 1985 the defendant led a group of protestors to the Kwekwe Police Station where the deceased had taken refuge. The defendant and his group forcibly removed from police protection the deceased, dragged him to the open grounds of the police station and assaulted him to death having accused him of being a supporter of dissidents.

⁴⁶ At pp. 1-10

That a person who has sought protection from the police can be forcibly removed from their custody and be killed right in the eyes of the police is difficult to believe and yet, in this case, it did happen. However, the only positive aspect of this case, unlike the Banda case, is that the perpetrators of the crime were brought to trial and will receive justice in accordance with the ordinary laws of the country.

THE LEGAL FRAMEWORK OF THE STATE OF EMERGENCY AND PREVENTIVE DETENTION

The history of the State of Emergency goes back to 1965 when shortly before the Unilateral Declaration of Independence (U.D.I.) by the Smith regime, the Governor of Southern Rhodesia on 5th May 1965 declared a State of Emergency.⁴⁷ The State of Emergency has been renewed for one reason or another on a six monthly basis ever since. Under the Lancaster House Constitution the legal basis for the declaration of a State of Emergency is section 68. The existence of a State of Emergency permits certain derogations from the Declaration of Rights contained in Chapter III of the Constitution and allows the State to lawfully detain persons under specified circumstances and having observed the laid down procedures and safeguards.

Zimbabwe's Declaration of Rights is modelled on the United Nations Universal Declaration of Human Rights of 1948. The Declaration provides for the right of life, personal liberty, freedom from torture, inhuman and degrading treatment, arbitrary search or entry, freedom of expression, freedom of Assembly and association, freedom of movement and freedom from discrimination. Section 24 establishes an extraordinary right to apply directly to the Supreme Court for redress where a contravention of the provisions of the Declaration of Rights is alleged.

During a State of Emergency most of the rights can be suspended. More precisely, the State can suspend the following rights; personal liberty, freedom from arbitrary search or entry, freedom of expression, freedom of movement, freedom of assembly and freedom from discrimination.⁴⁸

On the other hand, the State of Emergency cannot be invoked to suspend the right to life, protection against slavery and forced labour, protection against torture, inhuman and degrading treatment, freedom from deprivation of property, freedom of conscience and secure protection of the law.⁴⁹

Preventive Detention

The legal basis for preventive detention is the Emergency Powers (Mainte-

⁴⁷ See Proclamation 51 of 1965

⁴⁸ See section 25 as read with para.1 of the Second Schedule.

⁴⁹ Ibid.

nance of Law and Order) Regulations⁵⁰ (the Regulations). Section 53(1) of the Regulations empowers a police officer to detain any individual for a period of up to 30 days if he reasonably suspects that such individual has acted or is about to act in a manner prejudicial to public safety or public order. Section 21 permits a police officer to detain pending inquiries a person for up to 30 days if he has reason to believe that there are grounds that would warrant that person's indefinite detention under section 17 of the Regulations. Section 17 itself permits the Minister of Home Affairs to authorize under his hand the indefinite detention without trial of any person if it appears to him that it is expedient in the interests of public safety or public order that that person be detained.

A person who is detained under the Emergency Powers Regulations is entitled to certain mandatory constitutional safeguards contained in the Second Schedule to the Constitution. These safeguards are that:

- (1) He shall be informed as soon as reasonably practicable after the commencement of his detention and in any event not later than seven days thereafter, of the reasons for his detention.⁵¹
- (2) He shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and to hold communication with him.⁵²
- (3) His case shall be submitted not later than thirty days (during a State of Emergency) after the commencement of the detention for review by the Review Tribunal which is established by Part III of the Emergency Powers Regulations.⁵³
- (4) The Review Tribunal shall review his case "forthwith".⁵⁴

⁵⁰ Statutory Instrument 458 of 1983.

⁵¹ Para. 2(1)(a). See *Paweni v Minister of State (Security)* HH-180-84 and *Minister of Home Affairs and Another v Austin & Another* S/C 79/86, where it was held that a detainee is entitled to be provided with sufficient reasons and information to enable him to know what is alleged against him so that he can make a meaningful representation when his case comes before the Review Tribunal. He must thus be provided with all material particulars which form the foundation of his detention. Vague, imprecise and bald general allegations will not suffice.

⁵² Para. 2(1)(a). See *Minister of Home Affairs v Dabengwa and Another* 1982(1) ZLR 236 where it was held that the right of access to a lawyer applies from the very moment of detention. The issue of whether or not denial of access invalidates the detention has not been ruled upon.

⁵³ Para. 2(1)(b). See *York v Minister of Home Affairs and Another* 1982(2) ZLR 48 (S), *Dabengwa v Minister of Home Affairs and Another* 1984(2) SA 345 (S) and *Bull v Minister of Home Affairs and Others* 1987(1) SA 422(H).

⁵⁴ Para. 2(1)(b). See also *Minister of Home Affairs and Another v Dabengwa* 1984(2) SA 345(S).

Paragraph 2 of the Schedule also gives the Review Tribunal power to recommend the release of the detainee if there is insufficient cause for detention. However, the President can reject the recommendation and if he does so he shall cause to be published in the *Gazette* a notice that he has rejected such recommendation.

When these safeguards are breached the detainee has a right to apply to the High Court for redress. Numerous cases have come before the courts where detained persons have sought redress in relation to violations of these safeguards.

What is important to note is that these safeguards are mandatory⁵⁵ and not discretionary and ordinarily a breach of a mandatory constitutional provision should invalidate the detention order and thereby entitle the detained person to his release. In *York v Minister of Home Affairs and Another* HH-218-32 the High Court ruled that the failure to submit a case to the Review Tribunal within thirty days was an omission which went to the root of the detention and invalidated the detention order.

However, in the later case of *Minister of Home Affairs and Another v Dabengwa* 1984 (2) SA 345(5), the Supreme Court, relying mainly on irrelevant and sometimes discarded foreign cases ruled that failure to review a case "forthwith" by the Review Tribunal did not invalidate the detention order and, therefore, did not entitle the detainee to an order of release. The detainee's remedy was a *mandamus* to compel the Review Tribunal to review his case. With respect, it is submitted that such an approach fails to take into account that the constitution is the Supreme law of Zimbabwe and that anything not done in accordance with the mandatory provisions thereof must be a nullity.⁵⁶ Failure to comply with a mandatory provision should invalidate the detention order and thereby entitle the detainee to his release.

By way of concluding this part it ought to be stated that both the High Court and Supreme Court have shown themselves to be willing to protect the right of individuals to personal liberty. As Reynolds J. stated in *Minister of Home Affairs v Allan* HH-202-85:

"Since time immemorial the liberty of the individual has been regarded as one of the fundamental rights of man in a free society . . . The protection of this right is enshrined in the Constitution of Zimbabwe, and the Courts will certainly play their part in preserving this right against all infringements and all attempts to erode or violate the principle involved."⁵⁷

⁵⁵ See *York v Minister of Home Affairs*, HC-H-218-82 at p.16

⁵⁶ PP. 51-55 See J. Hatchard. "Breach of Constitutional Safeguards in Preventive Detention Cases" Z.L.R., Vol. 3, 1985 114, at pp.115-118.

⁵⁷ At p.8 of.

Popular Enjoyment of the Rights Enshrined in the Constitution.

The fundamental question is whether or not the civil and political rights enshrined in the Constitution of Zimbabwe are capable of enjoyment by the majority of the people? This question may be dealt with in the context of one of the most hallowed of the civil rights proclaimed by the bourgeoisie after their triumph over feudalism. The bourgeoisie declared that everyone is equal before the law. This right is incorporated in section 18 of Zimbabwe's Constitution which provides that:

"(18)1) Every person is entitled to the protection of the law."

However, this protection of the law is available only at one's "own expense"⁵⁸. What this means is that for a person to obtain protection of the law he must "obtain and instruct a legal representative" at his "own expense". Failing that, he must represent himself in whatever legal proceedings are brought against him or are instituted by him with the exception of criminal proceedings for which the accused may be sentenced to death, in which case he is provided with a legal practitioner. He must represent himself against a background of a legal system riddled with complicated procedures and "elaborate technicalities and formalities incomprehensible even to the most educated non-lawyer bourgeoisie."⁵⁹

In a country, like Zimbabwe, where access to lawyers has always been a privilege of the rich and where the door to legal services for the working people has always been closed due to their economic and material deprivation, it is cynical in the extreme to speak of equality before the law or equal protection of the law. The provision of protection of the law reduces itself to naught if one realises that the majority of Zimbabweans are without the material means or resources to hire lawyers in order to mobilize their limited rights. The European Court of Human Rights at Strasbourg has held that the provision of equal protection of the law is an empty shell if it is not accompanied by effective material assistance to enable persons to pursue their rights in the courts with the assistance of lawyers.⁶⁰ There is no doubt that there can be no "fair trial" if one person is represented by a lawyer and the other unrepresented as happens in most criminal cases. Further, as the former Minister of Justice, Legal and Parliamentary Affairs, E. Zvobgo, once said when he was a board member of Amnesty International:

"It is meaningless for a state to proclaim that every person shall have recourse to the courts unless the procedures for doing so exist and can be readily utilized."⁶¹

⁵⁸ See Sections 13(3) and (18 (3) (d).

⁵⁹ See generally S.B.O. Gutto "The Political Economy of Legal Aid Advice Services" *Z.L.R.*, Vol. 3, 1985, I.

⁶⁰ See the case of *Airey v Ireland*, ECHR, 1979.

⁶¹ E.J.M. Zvobgo, "The Abuse of Executive Prerogative: A Purposive Difference Between Detention in Black Africa and Detention in White Racist Africa", *Human Rights Issue*, Vol. 4. 1976.

Ignorance of the law by the mass of the people in Zimbabwe is phenomenal. Consequently, very few people know about their constitutional rights. Even if they knew poverty, material deprivation and the high cost of lawyers would make it well nigh impossible for them to even begin to assert these rights.⁶² In this respect, it is fitting to quote V.I. Lenin;

"No laws on earth can abolish inequality and exploitation so long as production for the market continues, and so long as there is the rule of money and the power of capital."⁶³

The crucial point is that the civil and political rights so laboriously protected in Zimbabwe's Constitution are impossible to assert, enjoy and defend for the mass of the people without the achievement of broad socio-economic rights. For so long as the capitalist system remains intact these rights will forever be enjoyed by the propertied who can afford to mobilize the legal system to their favour. One can justifiably ask: What is the right to freedom and free participation in the political and other spheres of society's life if a person is without a job and doomed to an aimless, destitute and maddening existence? What is the right to life given the degree of poverty, hunger and lack of access to meaningful medical care and facilities? What is the right to freedom and happiness when the peasants work round the clock only to remain at the same level of poverty? What is the right to equal protection of the law and the right to a fair trial when lawyers and court procedures are beyond the reach of the mass of ordinary people? Finally, what is freedom of expression or assembly when illiteracy is a perennial shadow for most peasants and workers?

To ask these questions and to characterise these rights as "bourgeois rights" is not to advocate for the scraping of these political and civil liberties, but only to highlight that these rights are meaningless to the vast majority of the people unless they are accompanied by the achievement of broad socio-economic rights. These rights must be capable of being enjoyed by all the people. To enjoy these rights the mass of the people must have education, employment, material resources, health care and facilities and decent housing. However, the achievement of broad socio-economic rights is impossible for the people in countries dominated by imperialism, capitalism and exploitation.

THE FUTURE OF THE DECLARATION OF RIGHTS

The Declaration of Rights in Zimbabwe's Constitution is the only remaining entrenched part of the constitution that cannot be repealed or amended without a 100% majority in the House of Assembly until 1990, 10 years after the

⁶² See generally, I Donovan, "Lawyers' Role in the Protection of Human Rights in Zimbabwe", Unpublished paper presented to the Law Society Summer School, Inyanga, October, 1986 and S.B.O. Gutto, op. cit

⁶³ V.I. Lenin "The Land Question and the Fight for Freedom" *Collected Works, Vol. 1*, Progress Publishers, Moscow, 1978 at p. 438

attainment of independence. The question is whether or not the political leadership will retain the Declaration of Rights after that date. The clauses entrenching the inviolability of private property in the means of production must be substantially revised. There is no reason why the other progressive political and civil liberties should be repealed or be made non-justiciable. S. Mubako, Zimbabwe's Minister of National Supplies, has irrefutably made the case for the importance and necessity for justiciable Bills of Rights in his article "Fundamental Rights and Judicial Review: The Zambian Experience."⁶⁴ A positive indication that the Zimbabwean Government is committed to the protection of human rights after 1990 is that it ratified the African Charter of Human and Peoples Rights in May 1986. In the preamble to the Charter ratifying states reaffirm their adherence to the principles of human rights and freedoms contained in the declarations and conventions of the United Nations and the OAU. Article one of the Charter clearly states that:

"The member states of the OAU parties to the present charter shall recognise the rights, duties and freedoms enshrined in this Charter and *shall undertake to adopt legislative or other measures to give effect to them*". [emphasis supplied].

It is hoped that this indicates that the Zimbabwean government would retain a justiciable Declaration of Rights after 18th April, 1990.

CONCLUSION

Colonialism by its very nature amounts to legalized systematic denial of human rights in that it holds the indigenous people in bondage. To maintain this bondage the Rhodesian state not only enacted oppressive and tyrannical laws but also created and maintained a brutal and fascist police force, army and intelligence service to enforce these laws. The result was the creation of an undemocratic fascist and brutal legal system. Thus the culture of the Rhodesian legal system was one of severe brutality in both the content and enforcement of laws. This culture of brutality which permeated the entire Rhodesian state apparatus was inherited intact at independence. The brutal oppressive laws relating to state security have been largely maintained and have been extensively used in the post-independence period.

Accordingly, the post-independence period has seen a general maintenance of the Rhodesian culture of severe state brutality in the sense that the law enforcement agencies, which have remained largely the same, have been called upon to enforce the same brutal laws as existed under colonial rule. The continuity of brutal laws of Rhodesia into Zimbabwe is exemplified by the Law and Order Maintenance Act Chapter, ⁶⁵ and the Emergency Powers (Maine-

⁶⁴ *Zimbabwe Law Review*, Vols. 1 & 2, 1983-1978, pp.97-132.

⁶⁵ Witness the cruel and inconsiderable razing of "Squatters" homes reported in *The Sunday Mail*, 18-09-88.

nance of Law and Order) Regulations under which thousands of people have been detained without trial.

Thus Zimbabwe, like her predecessor, Rhodesia, has been characterized by an undemocratic and brutal legal culture which is totally inconsistent with the full realization and enjoyment of human rights. The brutalization of the masses is demonstrated by the action of the law enforcement agencies in dealing with; the problem of the dispossessed landless peasants generally categorized as squatters;⁶⁵ the indiscriminate, on and off, rounding up of women and girls in operations to curb prostitution;⁶⁶ the indiscriminate and incomprehensible shooting of unarmed young men and women attending a musical show at White City Stadium in February, 1988;⁶⁷ the detention of hundreds of people without due regard to the procedures laid down by law as has been shown above and the brutal assaulting and battering of student demonstrators at the University of Zimbabwe and the Harare Polytechnic college by the police on 29th September, 1988⁶⁸.

⁶⁶ This indiscriminate and brutal rounding up of women and girls suspected of prostitution has even been defended in Parliament by the Minister of Home Affairs, Moven Mahachi. Even the arrest and detention of a 16 year old school girl did not make the Minister feel obliged to give an apology to the parents of the girl. See *The Hansard* 04-08-88 and *The Herald*, 25-09-88.

⁶⁷ See *The Chronicle*, 22-02-88 and 25.02.88.

⁶⁸ The scenes at the University of Zimbabwe where baton-wielding policemen were sadistically assaulting students, throwing teargas cannisters into their Halls of Residence and chasing them all over campus were indistinguishable from the actions of the South African police in Soweto and other "black" parts of South Africa. These brutal scenes were given full coverage on the ZTV main news bulletin at 7.45 p.m. on 29th September, 1988 and one would have been forgiven for thinking that the film clip had come from South Africa.



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